UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Ronald Delorme as Hereditary Chief of the Little Shell Band of Indians and its Grand Council,	)	
Plaintiff-Appellant,	)	
vs.	)	Case No. 02-3460
United States of America,	)	
Defendant-Appellee.	)	

BRIEF OF APPELLANT

On Appeal from Judgment
U. S. District Court
For the District of North Dakota, Southwestern Division
Hon. Patrick A. Conmy, Presiding

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Aboriginal land ownership rights of Indians cannot be divested unless there is a treaty with the United States. Appellant here, the lineal descendants of an aborginal band of Indians, established rights to Minnesota and North Dakota lands by centuries of use and occupancy. In 1863 by Treaty they ceded their interest in a large acreage of Minnesota and a small strip in North Dakota. The consideration promised by the United States was never paid. Forty years ago they brought an action before the Indian Claims Commission. They were awarded approximately $237,000.

Their rights in about 10 million acres of ancestral lands in North Dakota were taken without a Treaty or payment. Forty years ago they brought an action before the Indian Claims Commission. Other bands with somewhat similar interests were joined. Plaintiffs were awarded approximately $47,000,000.

Both judgments were funded by Congress and the money entrusted to the Bureau of Indian Affairs. The Little Shell have never received their portion of either of these awards. In the court below they sought an order requiring an accounting of their funds. The court dismissed their Complaint based on sovereign immunity. The issues are lengthy and complex and they request 30 minutes for oral argument.

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JURISDICTIONAL STATEMENT

A. SUBJECT MATTER JURISDICTION:

1. Original U. S. District Court jurisdiction: 28 USC 1331
2. United States of America is the defendant: 28 USC 1346
3. Any person of Indian blood or descent, to any allotment of land under any Act of Congress or Treaty: 28 USC 1353

B. COURT OF APPEALS JURISDICTION:

Jurisdiction for the appeal is pursuant to the provisions of 28 USC 1291. The U. S. District Court for the District of North Dakota is a part of the 8th Circuit Court of Appeals.

C. FILING DATES:

Rule 4(a), F.R.Cv.P., provides a notice of appeal must be filed with the clerk of court within 30 days after a judgment is entered. Judgment in this case was entered September 24, 2002. Appellant filed his Notice of Appeal on October 4, 2002.

D. STATEMENT ON APPEAL:

The appeal is from a final judgment disposing of all of the party's claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Is Plaintiff's Claim Barred by the Doctrine of Sovereign Immunity?

Apposite Cases:

A. Cobell v. Babbitt, 30 Supp.2d 24 (District of Columbia 1998)

B. United States v. Mitchell ("Mitchell II"), 463 U.S. 206, 225, 77 L.Ed. 2d 580, 103 S.Ct. 2961 (1983)

C. United States v. Dann, 470 U.S. 39

D. *Young v. City of St. Charles, 244 F.3d 623 (8th Cir. 2001)*

II. Does Plaintiff have Standing to Bring this Action?

Apposite Cases:

A. Young v. City of St. Charles, 244 F.3d 623 (8th Cir. 2001)

B. Hafley v. Lohman, 90 F.3d 264 (8th Cir. 1996)

C. Breedlove v. Earthgrains Baking, 140 F.3d 797 (8th Cir. 1998)

STATEMENT OF THE CASE

This action involves two separate aboriginal land claims. One claim is based upon an Indian Claims Commission judgment (Docket 18 A), which recognized money, was still owing to the Little Shell Band pursuant to a Treaty of 1863. The judgment award was funded by Congress and placed in trust with the Bureau of Indian Affairs. The funds have never been paid to the Little Shell Band. The other claim is based upon an Indian Claims Commission judgment (Docket 221) that recognized that without just compensation the United States of America had taken 10 million acres of land in which the Little Shell Band had an aboriginal interest as a result of its historical use and occupancy. Congress also funded that judgment and the money placed in trust with the Bureau of Indian Affairs. Those funds have never been paid to the Little Shell Band either.

This is an action for an accounting of those funds. The United States moved to dismiss pursuant to Rule 12 FRCP asserting lack of subject matter jurisdiction. The United States District Court for the District of North Dakota granted dismissal upon grounds of governmental immunity, statute of limitations, failure to state a claim, and was critical of "standing". Plaintiff appeals.

STATEMENT OF THE FACTS

The Little Shell Band is made up of lineal descendants of a nomadic, aboriginal group of Indians who in 1863 were led by its great Chief, Ase-anse or Essence (hereafter "Chief Little Shell"). The Little Shell Band is not a "recognized tribe" as that term is used for Indian groups who have sought and received formal recognition by the federal government.

The Little Shell Band as it existed in 1863 divided into two groups approximately a century ago. Some of its members were driven by poverty, hunger and government "removal policy" out of North Dakota to settle permanently in Northern Montana. Today they refer to themselves as the "The Little Shell Band of Montana". They and their interests are not involved in this litigation.

The lineal descendants of the Little Shell Band who bring this action through their hereditary chief live in various areas of the United States. The governing group, The Grand Council of 1863, live primarily in north-central North Dakota. They presented three claims to the lower Court. The dismissal of two claims are presented here on appeal . A claim for proceeds of a Bond presented to the lower Court is not pursued here.

The policy of Congress, reserving for itself exclusive power to negotiate Treaties that would expropriate aboriginal rights, was affirmed in United States v.

Santa Fe Pacific RR, 314 U.S. 347 (May 1941). In addition, in the Louisiana Purchase the French extracted a promise from the United States that aboriginal rights would not be usurped in the area being purchased. Some of the area involved in this litigation was a part of the Louisiana Purchase:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess." Louisiana Purchase, Part III, October 18, 1800.

In addition, the Act by which Congress created the Territory of Dakota specifically provided there could be no impairment of Indian property rights in that territory unless the Unites States first obtained the consent of Indians having aboriginal rights therein. Act of March 2, 1861, 12 Stat. 239. Sec 1.

Throughout the 1800's the desire for new lands and the idea that it was white man's "manifest destiny" to settle the continent resulted in a relentless westward migration by white settlers into the Indian's aboriginal lands. It did not matter whether the government had a treaty with the affected Indians. Throughout the 1800's the government frequently stood in blatant violation of its own statutes.

As the white settlers poured into the West, official government policy sought to encourage removal of Indian Tribes through a series of "resettlements" and voluntary westward migrations. Unsettled lands "further west" were offered in

exchange for Indian lands the whites wanted to settle. See e.g., The Indian Removal Act of 1830, ch CXLVIII, 4 Stat. 411. When official policy didn't work, unofficial policy encouraged forcible relocation. Cobell v. Norton, 345 U.S. App. D.C. 141, 240 F.3d 1081 (Feb 23, 2001).

In the late 1700's and throughout the 1800's a massive white migration had forced these bands out of their woodland homes in Michigan, Wisconsin and Minnesota and pushed them farther west into the Dakota Territory and what is now Montana. Eventually those who moved survived on the Great Plains as hunters, fishers and trappers.

By the 1860's thousands of white settlers had staked out claims in Minnesota and along the Red River in North Dakota even though there was no treaty divesting the Indians who lived there of their aboriginal rights to those lands. In 1863 the Homestead Act was passed. By the 1880's more than a million white settlers had moved into the Western Plains.

As the white settlers pushed westward the government agents followed behind and attempted to legitimatize the takings after the fact. The government felt compelled to attempt compliance with the law and sought consent of the aboriginal tribes whenever possible.

Thus it was that on October 2, 1863, at a location known as the "Old Crossing" in Northwestern Minnesota, government agents met with the Chiefs of the Red Lake Band of Chippewa and the Pembina Band to negotiate a divestiture of their aboriginal rights in Minnesota and a strip of land along the west side of the Red River. The negotiations were successful and a treaty was signed. (App. P.92-98) Little Shell, Chief of the Pembina's, was one of the signers.

As consideration for this relinquishment of millions of acres, the United States agreed to pay $20,000 a year for 20 years. In addition, the government extended numerous personal allurements to gain the signatures of the individual chiefs: Moose Dung, Red Bear and Ase-Anse or Essence (also known as Little Shell). Homesteading rights were granted to members of these bands and the government created two "reservations" of 640 acres each. One was for Chief Red Bear and his Band located on the north side of the Pembina River and the other for Moose Dung and his Band near the mouth of the Thief River.

Little Shell was known as the Great Chief of the Little Shell Band. His title had devolved upon him by patriarchy in keeping with tradition. His Chieftain bloodline dated back to the 1700's. His Band was considered friendly to the French and English fur traders. These traders began making incursions into the Great Plains as early as 1738. The first white man to explore the area of Little Shell's aboriginal ownership was Pierre Gaultier de Varennes (a/k/a Verendrye).

Verendrye explored as far south as an area just east of what is today Bismarck, North Dakota. Chief Little Shell saw the advantage of being friendly to the white man. A brisk commerce developed between his Band and the white fur traders. (App. p.118) His Band was helpful to the fur traders in dealing with other belligerent and war-like Bands in the area.

The Old Crossing Treaty of 1863 primarily involved aboriginal Indian claims in Minnesota but it also included a strip of land a few miles wide on the west side of the Red River. This strip was the area to which Chief Little Shell and his Band had strongest claim.

The "Old Crossing Treaty" of 1863 did little to relieve the pressure of homesteaders marching westward faster than treaties could be negotiated. After 1863 as the settlement drama unfolded the government's response was to apply pressure to Little Shell and his Band in an attempt to get them to give up their land voluntarily and to go settle on a reservation.

Chief Little Shell was not interested in doing so. His Band had become nomadic hunters, fishers and trappers and they did not want to "settle down" and be confined to some tiny area on the Plains.

> "Despite the warnings of the then Commissioner of Indian Affairs, H. Price, who maintained that the group had as good a title to their lands as had any Indians in North America, The government, on October 4, 1882, officially opened 9 million acres, the land claimed by the Pembina Band to white settlers." (Report of the Commissioner of

Indian Affairs for 1884 quoted in Waiting for a Day That Never Comes, Verne Dusenberry, "Montana" Spring 1958, p. 33 App p. 509)

In an attempt to accommodate government policy, the President of the United States created the Turtle Mountain Reservation by Executive Order in 1882 (App. p.99.) It was hoped the new reservation would entice the nomadic Little Shell to settle down. The reservation was comprised of approximately two townships.

Wild game on the Great Plains was disappearing and the government hoped that as a matter of survival Little Shell and his band would agree to be contained within this small area. They would have access to government assistance and for food and shelter when it was needed. Some Pembina, including some from Little Shell's Band, took the bait. Many of the descendants of those people remain on the Turtle Mountain Reservation to this day.

Little Shell's response, however, was to negotiate for a larger area. He wanted a half million-acre reservation in the Turtle Mountain area that would be nearly 30 miles by 30 miles (19 townships). In addition he wanted a reservation in Montana that would contain another half million acres. (App. p.120.) The government was unwilling to agree to his demands. The parties stood at impasse.

In 1863, at the Old Crossing, Little Shell had been willing to go along with the other chiefs as they agreed to cede millions of acres of aboriginal lands in

return for the promise of $20,000 a year for 20 years. At that time Little Shell's principal interest was in the lands immediately to the west of the area being ceded. He did want payment for the narrow strip of land that was on the west side of the Red River. But he was comfortable in his belief that after these concessions to the white man his Band would be left unbothered in the 10-15 million acres to the west.

By the time the Turtle Mountain Reservation was created in 1882, however, Little Shell and his band had become totally disenchanted with the treaty promises that had been made to them. The federal government had failed to make good on the payments promised at the Old Crossing in 1863. By 1882 Little Shell and most of his Band were no longer willing to swap the 10,000,000 acres they owned in North Dakota for a promise of 46,000 acres in the Turtle Mountains. The government made various efforts to get the 10,000,000 acres by negotiation. Senate Report No 693, Fifty Sixth Congress, First Session (App. p. 113-291) June 6, 1900 reported as follows:

> "From time to time, prior to 1892, the government had sought to secure a relinquishment of the Indian title to said tract of land from this band [the Little Shell] without success. Id.
>
> …
>
> "Attempts were also made by the Government to secure the consent of these Indians for their removal to some other reservation. [Fort Berthold] The said Band seemed greatly attached to their home, [comprised of over 10 million acres] and no amount of persuasion could induce them to remove therefore; finally, in 1892, by act of

> Congress a commission, was appointed by the President to secure the relinquishment of their Indian title to all territory claimed in the State of North Dakota, and to induce this band to remove to some other location." Id.

For the Band's stubborn refusal to be confined on a reservation, however, there was retribution by the agents of the federal government. When Little Shell and his Band refused to become reservation settlers, payment to them for their portion of the $20,000 annual payments promised at the Old Crossing in 1863 were withheld. The Little Shell were told they would only receive the benefits of the payments if they would settle down on a reservation. This they refused to do. As late as the 1890's Little Shell and his band continued to fish, trap, hunt, and engage in commerce with the white man.

One hundred years later the descendants of this Band and the other Bands involved sued the United States for its default in payments promised by the Treaty of 1863 (19 Ind.Cl.Comm. 205). In addition they alleged they had not received fair compensation for what they had given up. On June 9, 1964, in Docket 18A, the Indian Claims Commission awarded $2,034,889.56 to the lineal descendants of Moose Dung (Red Lake Band) and Little Shell (Pembina Band). Of this amount $237,127.82 was determined to be the Little Shell Band's share.

Plaintiff's Second Cause of Action in this lawsuit alleges that to this day the $237,127.82 has not been paid to the Little Shell. They asked the lower court here to order an accounting and take control of the funds.

When economic coercion to make the Little Shell Band reservation Indians did not work, the government recognized it was faced with a serious legal problem. There was no treaty in place that would divest Little Shell's Band of the 10 million or more acres the government had already opened up to homesteaders. To deal with this crisis Congress passed the Act of July 13, 1892. This Act established a Commission headed by one P.J. McCumber (later a U.S. Senator from North Dakota.) The sole purpose of the Commission was to convince these various Indian Bands they should relinquish their aboriginal rights and move onto reservations.

The McCumber delegation asked the Indians bands to meet and engage in negotiations for a Treaty. They gathered together at Belcourt, North Dakota on September 21, 1892. The Commission offered 10 cents an acre for the roughly 10 million acres involved.

Chief Little Shell balked. He thought 10 cents an acre for 10 million acres of some of the richest farmland in the nation was inadequate.

Little Shell insisted on a large reservation and more money before his Band's land would be ceded. McCumber refused to budge on his 10-cent offer. Little Shell and his braves got up and walked out, never to return to the negotiating table. To this day the United States of America has never entered into a Treaty with the Little Shell Band. Instead the Court of Claims awarded money damages for the

government's taking. In Docket No. 221 (App. p. 330-355), the court found the Little Shell were entitled to be compensated. To this day none of the money awarded has ever been distributed to them.

When Little Shell and his braves left the bargaining table, the McCumber Commission did not want to give up on the mission it had been sent to do. It had been charged with the responsibility of returning to Washington D.C. with a treaty by which the aboriginal rights of the Indians who inhabited most of the northeast quadrant of North Dakota would be extinguished. When Little Shell refused to sign the proposed treaty the McCumber Commission staff solicited 32 young, male, Indians to sign a bogus treaty.

The Indian signatures obtained were those of 16 Chippewa half-breeds and 16 Chippewa full bloods. They were people who had no leadership role or authority to speak or act on behalf of the Little Shell Band. (App. p. 145.) They were simply rounded up and brought to Pembina from the surrounding area. They came without provision for food or shelter. As the negotiations dragged on they become half-starved. The impasse remained. Chief Little Shell saw what was happening and approached a local Catholic priest, Father J.F. Malo, and asked him to intercede to avoid a calamity. With his intervention provisions were finally made for the 32 imposters.

Once the 32 were taken into the negotiating room it was full. Others were unable to participate or even observe. The 32 signed. The Treaty that was eventually signed by the government came to be known as the infamous "10 cent Treaty". It was obtained without the consent of the Pembina leadership. Seventy years later in the Indian Claims Commission it was proved the false treaty was unconscionable (App. p. 330-355.)

It took another 13 years for the U.S. Senate to ratify the false treaty over the strong and bitter protest of the Little Shell Band. It never became a treaty with the Little Shell. Little Shell and his Band never received a dime of the one million dollars.

Within days of the signing, on October 24, 1892, Little Shell's Grand Council of Pembina met to renounce the treaty. They protested that it was not the product of persons having authority to give away the Pembina's aboriginal lands. Their lawyer, John Bottineau, continued to register frequent and loud protests. In a written report filed with the Commissioner of Indian Affairs, he wrote:

> "Because said agreement, or 10 cent treaty, so called, was unlawfully concluded and executed with the younger or unauthorized members without the consent or approval of the chief and the council of the tribe said Chief Little Shell and his council which is composed of his braves, the leading and representative men of the tribe, did not only refuse to sign said proposed agreement, but also did then and there oppose its execution, and ever since have protested against its ratification by Congress for the good and valid reasons and objections set forth." (Proceedings of the Grand Council, filed with the

> Commissioner of Indian Affairs, File No 1993, Special Case No. 110, January 1893.) (App. p.143-150.)

In its own report to the President, the McCumber Commission conceded things had not gone as they should have:

> "While the agreement is not in exact accordance with the act of Congress providing for the commission and defining its duties it is forwarded for the favorable action of Congress as the best available". (App. p.101.)

Chief Little Shell died in 1901. His son-in-law, Rising Sun, became Chief. The Band continued to protest ratification of the treaty even after Congress ratified it in 1905. For decades they protested the great injustice that had been done to them. In return they received only government retribution.

The people who did accepted the McCumber Treaty became enrolled members of the federally recognized Turtle Mountain Band of Chippewa. As the 20th Century proceeded and homesteaders tied up all the land, the followers of the Chief Little Shell Band settled in the Belcourt and Turtle Mountain areas of North Dakota.

Members of the Little Shell Band attempted to preserve the Little Shell Grand Council as an ongoing governing entity. But if they "assembled", or spoke out on behalf of "Little Shells", they were threatened, thrown in jail, denied contracts, employment, health service, and governmental commodities (App. p.295.) **"**If they attempted to hold "Little Shell"' meetings to discuss the pursuit of

“Little Shell” rights they were arrested and fined.” They held secret meetings. “Pow Wows” were conducted in private homes so they would not be observed. Bingo and other activities were conducted to raise money so that Little Shell representatives could secretly go to Washington D.C. to meet with government officials to seek redress for their grievances.

At one point, just as had been done to the Cherokee in the 1830’s, the government "relocated" a group of Little Shell by loading them onto railroad boxcars and hauling them to a point along the northern border of Montana where they were dumped off. Descendants of those banished members still live there today. They became the Little Shell of Montana.

In the 1930’s Thomas Little Shell, the “Great Chief’s” grandson, lobbied for the creation of a commission where the wrongs that had been committed against his people might be vindicated. Congress finally created an Indian Claims Commission under the Court of Claims in 1946 to hear “claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive Orders of the President.” Pub. L 79-726, 60 Stat. 1049. 25 U.S.C.70

The directions given to this Commission by the Congress included a mandate that the violations of Indian rights associated with the “ten cent treaty” be investigated and adjudicated. The mandate expressly included a charge that the

Commission investigate the treatment that had been given to the Little Shell Band. Instructions to the Court of Claims by Congress included the following:

> "Whether the Agreement of 1892 was consented to and ratified by the Band or Chief or Thomas Little Shell and the amount of any loss to said land resulting from actions taken under said agreement without the consent of said band?
>
> "Whether the lands to which Chief Little Shell's Band had title by occupancy were taken from it without the consent of that band and what the value thereof would be?
>
> "Whether under the Agreement of 1892 lands were taken by the United States of America without payment of adequate consideration therefore or without paying any consideration at all?" (Emphasis added) Id.

After passage of the Act creating the Indian Claims Commission, the lineal descendants of Chief Little Shell hired a lawyer, Lawrence C. Mills of Chicago, Illinois to represent their interests. At that time Louis Delorme was Chief of the Little Shell Grand Council of 1863. He was the father of the plaintiff-appellant herein. Mills sought compensation for the government's taking of the Little Shell's ancestral lands. The lawsuit filed was filed as Docket No. 221 before the Indian Claims Commission (App. p. 295-296.)

Those Pembina who had agreed to settle on the Turtle Mountain Reservation and had become enrolled members of the federally recognized Turtle Mountain Band also filed a separate lawsuit. They hired the Wilkenson Law Firm of Washington D.C. to represent them. Their claim was based upon an assertion that

the 10 cents an acre that had been paid to their ancestors under the McCumber Treaty was unconscionable. Other Pembina affected by the unconscionable amount also filed their own separate lawsuits. These included the Red Lake Band, the White Earth Band in Minnesota and the Rocky Boy of Montana.

The Indian Claims Commission joined all the lawsuits for trial because it felt the factual evidence as to the value of the lands at the time they were “taken” and the evidence establishing the rights of those Bands would all be based on similar or identical evidence.

At the commencement of the lawsuit great effort was made by the government to convince the Indian Claims Commission that the Little Shell's case should be dismissed. The assertion was that the Little Shell were so assimilated into the Turtle Mountain Tribe that they had lost their identity as a separate entity. The government insisted that the Little Shell claim was totally incorporated within the claims being made by the Turtle Mountain Tribe. This is an assertion that persists to this day in spite of the fact it was soundly rejected by the Indian Claims Commission and the Court of Claims on appeal. The Indian Claims Commission said:

"Since the Commission allowably found that the ancestral Turtle Mountain Band divided because of Little Shell's protest against the McCumber negotiations, and since the present Turtle Mountain Band does not claim to represent all of the present Little Shell members, the later group is entitled to separate representation as a claimant on behalf of the original Turtle Mountain Band. As we held in *McGhee*, the ancestral group ‘owns’ the claim, and the

present day Indian groups are before the Commission only on behalf of the ancestral entity. 122 Ct. Cl. at 386-88. The conclusion reached in *McGee* is that an officially organized group of descendants of the ancestral entity, and an identifiable but unorganized group of descendants, are both entitled to separate representation in the proceedings before the Commission. Id, See also Cherokee Freedmen v United States, 195 Ct Cl. 39, 45 (1971). This principle is controlling here and authorized the separate participation by the Little Shell plaintiffs whom the Commission could permissibly deem, in view of the band's genesis and history, as an 'identifiable group'". Turtle Mountain Band of Chippewa Indians, et al., v. The United States, 203 Ct. Cl. 426 (App. p.370.)

The litigation lasted ten years. The Committee awarded $52,527,337.97. After attorney fees and set-offs the claim was established at $47,376,622.93. (App. p.355.) The government appealed the judgment to the Court of Claims. The Turtle Mountain Band cross-appealed. In their cross-appeal the Turtle Mountain Band took up the earlier fight the government had tried to make and attempted to have the Little Shell Band ousted as one of the successful claimants. They wanted to be the sole recipient of the lawsuit proceeds and have total control over its distribution. They wanted to make all decisions about who qualified to receive a share of the award. They asked the Court of Claims on appeal to find that the Little Shell had been so assimilated into the Turtle Mountain Band that it did not exist as a separate entity. The argument was soundly rejected by the Appeals Court. The Court of Claims said:

> "In attacking this holding, [by the Indian Claims Commission] the Turtle Mountain Band first attempts to swallow the Little Shells by contending that most, or the great majority, are Turtle Mountain members. But we do not understand the Turtle Mountain Band to

> concede that all of the Little Shell Bands are Turtle Mountain members, and the Little Shells deny that that is so. This being the case we cannot mechanically conclude that the Little Shell petitioners are barred from separate participation." (emphasis added.) Turtle Mountain Band of Chippewa Indians, et al., Id., (App. p. 369-370.)

Before the Court of Claims the Turtle Mountain Band also attacked the Little Shell's rights as a separate and distinct entity upon the ground they were not "organized". They asserted that only that part of the Turtle Mountain Indians that had achieved official federal "recognition" by the Secretary of Interior was entitled to be the exclusive representatives of all the plaintiffs in the action. The idea that only Indians that are a part of a "recognized band" was carried forward at the Agency Superintendent level. 20 years later when distributions begin this same notion still govern governmental action. Agency Superintendent Dorene Bruce wrote to a Little Shell legal counsel as follows:

> "There are no program funds available for the Little Shell band of North Dakota nor will there be until this group becomes Federally recognized. The Bureau of Indian Affairs does not have the authority to set aside funds for Little Shell of North Dakota." (App. p. 304.)

But the Court of Claims had clearly rejected any notion that the Band had to be an "organized Band" or one that had been federally recognized in order to be entitled to its own separate share. (App. p. 370.)

Echoing the Indian Claims Commission, the Court of Claims said:

> "But the Little Shell Chippewa's need not have formed a separate band or other organized entity in the 1892-1905 period in order that an identifiable group of their descendants may bring this claim separately. Since the Commission allowably found that the ancestral Turtle Mountain Band divided because of Little Shell's protest against the McCumber negotiations, and since the present Turtle Mountain Band does not claim to represent all of the present Little Shell members, the latter group is entitled to separate representation as a claimant on behalf of the original Turtle Mountain Band. As we held in *McGhee* the ancestral group 'owns' the claim and present-day Indian groups are before the Commission only on behalf of the ancestral entity. 122 Ct.Cl. at 386-88. The conclusion reached in *McGhee* is that an officially organized group of descendants are both entitled to separate representation in proceedings before the Commission. Id, See also *Cherokee Freedmen v United States*, 195 Ct. Cl. 39, 45 (1971). This principle is controlling here and authorized the separate participation by the Little Shell plaintiffs whom the Commission could permissibly deem, in view of the band's genesis and history, as an 'identifiable group'". (Emphasis added). (App. p.368.)

After losing in the Court of Claims on appeal the Turtle Mountain Band's lawyers advised their clients they should not appeal to the United States Supreme Court. Obviously the lawyers decided it would be wise to keep the Little Shell Band in the litigation because their claims were better, more ancient and more legally compelling than those of the other claimants. (App. p.371-373.)

It took another ten years before Congress conducted hearings to fund the award in Senate Bill 1735. (App. p. 374-473.) The Little Shell were not financially able to attend those hearings. (Letter from Mary Wilson, on behalf of the Little Shell Band of North Dakota, Hearing on S. 1735 before the Select Committee on

Indian Affairs, United States Senate, Ninety-Seventh Congress, Second Session, June 17, 1982. App. p.435)

The Chairman of the Turtle Mountain Band, representatives of the BIA and the Secretary of Interior's office did attend. Before Congress the Turtle Mountain Band continued its fight to exclude the Little Shell from participation in the award. They argued for a structure that would accomplish what they had been denied by the Court of Claims. Their Chairman proposed a committee, appointed by his tribe, to screen all persons claiming to be of Pembina Descendancy to meet a 1/4th blood quantum requirement for eligibility to share in the award. Id. Statement of Richard J. Lafromboise, Chairman of the Turtle Mountain Band of Chippewa Indians. Id.

John W. Fritz, Deputy Assistant Secretary for Indian Affairs, also took up the cause of devising a plan that would exclude the Little Shell. He stated in his testimony at the Senate hearings of S. 1735 (App. p. 380-383) as follows:

> "There are factions of Pembina Chippewa who continue to assert that they are fully representative of the historic Pembina Band that should be the sole beneficiaries of the award funds. Usually referring to themselves as the Little Shell Band, they are principally located in North Dakota in the Turtle Mountain Reservation area."

Continuing on he said:

> "[proposed] S. 1735 nowhere contains the identification 'Little Shell Band' and this we find to be consistent with our recommendations. The appellation Little Shell is of no value in establishing Pembina ancestry." Id, Testimony of John W. Fritz.

Next came testimony from Ken Scott, Assistant Secretary of Indian Affairs for the Department of Interior, who echoed the words of Mr. Fritz:

> "The appellation Little Shell is of no value in establishing Pembina ancestry." Id.

Because of this official stance by the Executive Branch, to this day the Little Shell have never been allowed to share in the award money won.

SUMMARY OF ARGUMENT

The District Court erred in granting dismissal of Plaintiff's claims upon grounds they were barred by sovereign immunity and a Statute of Limitations. Sovereign immunity and Statutes of Limitation do not apply where two claims against the United States were won by the plaintiffs before the Indian Claims Commission and were reduced to a money judgment. After the judgment was funded by Congress the money appropriated was entrusted to one of the United State's agencies, the Bureau of Indian Affairs, for safekeeping, investment and disbursement.

At all times since the United State's role went from that of debtor to trustee, the United States has failed and refused to account for or disburse the funds of the plaintiff that were entrusted to it.

The United States has a duty to account for, safe keep, invest and distribute plaintiff's money in accordance with the provisions of the judgment that rendered the award. The United States assumed the role of fiduciary and trustee. The fiduciary duties assumed by the United States are current and ongoing. They are not subject to any defense of sovereign immunity and no Statute of Limitations barring enforcement of those duties has been tolled.

ARGUMENT

The nature of the claims presented to the trial court are such that they are not subject to a defense of governmental immunity or to any statute of limitations. This court reviews a district court's order granting a motion to dismiss de novo. Each of the two issues raised should be reviewed de novo.

> "When ruling on a motion to dismiss, the district court must accept the allegations contained in the complaint as true and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party. Hafley, 90 F.3d at 266. A complaint shall not be dismissed for its failure to state a claim upon which relief can be granted unless it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of a claim entitling him to relief. Breedlove v. Earthgrains Baking, 140 F.3d 797, 799 (8th Cir. 1998)." Young v. City of St. Charles, 244 F.3d 623 (8th Cir. 2001).

An understanding of the history of the claims is essential to identifying the nature of the claims. This is not an action for money damages. It is an action asking for an accounting of funds awarded to the plaintiffs by the Indian Claims Commission.

The first claim had its origin in a Treaty of 1863. On October 2, 1863, appellant's ancestors entered into a Treaty with the United States of America. The Treaty was in response to the pressure of homesteaders who sought to settle in western Minnesota and eastern North Dakota. The homesteaders were in violation of federal statutes that prohibit the taking of lands in which Indians have acquired ownership rights through long-term use and occupancy. Under the statute (Section

12 of the Indian Trade and Intercourse Act of June 30, 1834, 4 Stat. 729 - codified in 25 U.S.C. 177), ownership of aboriginal lands cannot be divested unless the United States enters into a Treaty with the Indian entity owning those rights. By the Treaty of 1863 (App. p.92-95) the Little Shell Band ceded their aboriginal claims to a large acreage in western Minnesota as well as to a narrow strip along the west side of the Red River in North Dakota.

By the time of the Treaty, to a large extent, white settlers had already pushed the Little Shell out of those lands. The Little Shell concern in 1863 was to preserve their remaining aboriginal rights in 10-15 million acres of land further west in what is now North Dakota.

By the Treaty of 1863 the Little Shell agreed to accept payments of money over 20 years along, with other benefits. That money was never paid to them. In the 1950's and 1960's they pursued a claim before the Indian Claims Commission in which they alleged the non-payment, but also asserted the consideration that had been agreed to was not just compensation. The Indian Claims Commission awarded $237,127.82.575. (App. p.305-328.) At. 85 Stat 158 Congress funded the award. The present action arises because, once again, the Little Shell never actually received the funds. In this action they asked the lower Court to order an accounting and requested the Court assume supervision of their judgment funds.

The second claim has it origin in an award made to the plaintiffs by the

Indian Claims Commission. This award was based upon the fact the United States of American had never compensated the Little Shell Band for the taking of about 10 million acres of land to which their ancestors had gained rights of ownership by centuries of use and occupancy.

The Treaty of 1863 had only relieved the homestead pressures upon the Little Shell Band for a few decades. The homesteaders pushed into the lands the Little Shell had not ceded in 1863. By 1892 the federal government deemed it necessary to create a Commission charged with responsibility to negotiate another Treaty by which the Little Shell Band (and other bands) would give up approximately ten million acres of land in North Dakota and move onto reservations.

Negotiations with the various bands were held in 1892. Government representatives offered them a total of ten cents an acre for ten million acres. The government promised these Bands they would make installment payments on the money.

Chief Little Shell and his braves walked out of negotiations with that Congressional Commission and never returned. They did not believe 10 cents an acres was adequate. They wanted a larger reservation than what was offered. The Commission staff proceeded to enter into an agreement with other bands and with individual Chippewa conscripted to sign. The Little Shell leadership was ignored.

An agreement presented to Congress without Little Shell consent. The Little Shell protested vehemently to Congress and received no response. They struggled unsuccessfully for decades to find a redress for this grievance.

Chief Little Shell died in 1901. In the 1930's and early 1940's his grandson, Thomas Little Shell, became a driving force that caused Congress to create an Indian Claims Commission (60 stat. 1049, 25 U.S.C. 70). The purpose of the Commission was to hear and resolve Indian land claims like the Little Shell's. The existence of the Little Shell claim was expressly acknowledged in the legislation that created this Commission. (Pub. L 79-726, 60 Stat. 1049, 25 U.S.C. 70.)

The Little Shell Band filed claims before the Indian Claims Commission asking they be compensation for the taking of their land and for the non-payment of the amounts promised in the Treaty of 1863. Other Bands that had signed the "McCumber Treaty" in 1892 also filed claims asserting that the treaty their ancestors had signed had not provided fair compensation.

At the outset of that litigation the government sought unsuccessfully to have the Little Shell claims dismissed. The government claimed no such entity as the "Little Shell Band" existed. The Court denied the motion and the Little Shell proceeded to trial.

The claims of the Little Shell and the various other Bands were consolidated for trial. Judgment was entered in 1972. After offsets and attorney fees, an award of $47,376,622.93 was made to the claimants. (App. p. 477.)

The government appealed the judgment. One of the prevailing claimants, the Turtle Mountain Band of Chippewa, cross-appealed claiming the lower court erred in allowing the Little Shell Band to have its own separate participation. The Turtle Mountain Band claimed the Little Shell had been so completely assimilated into their Band that they no longer existed as a separate, identifiable entity. They asked that any Little Shell portion of the award be awarded to the Turtle Mountain Band.

The Court of Claims disagreed and expressly affirmed the Little Shell's right to separate participation. (App. p. 368-370.)

Ten years later, Congress funded the award. (App. p. 329.) In doing so Congress identified five entities entitled to share. In spite of the express findings of the Court that the Little Shell were entitled to participate as a separate, identifiable, historical entity, Congress did not specifically identify the Little Shell as one of the five entities entitled to share in the award. Congress created a new entity that had not participated in the litigation at all. Congress called this new entity the "Non-member Pembina Chippewa Descendants".

The award was funded and the task of distributing it was delegated to the Bureau of Indian Affairs. In carrying out the Congressional mandate the B.I.A. and its sub-agencies refused to include the Little Shell Band in the distribution process. The Little Shell were told they were not a recognized tribe and the B.I.A. had no authority to deal with them. The Court of Claims, however, had dealt with this issue:

> "But the Little Shell Chippewa's need not have formed a separate band or other organized entity in the 1892-1905 period in order that an identifiable group of their descendants may bring this claim separately." Turtle Mountain Band of Chippewa Indians, et al., 203 Ct. Cl. 426, 28.

At all times the funding statutes and the regulations promulgated to implement the award were interpreted to exclude participation of the Little Shell as a separate identifiable entity. From the outset of the disbursement stage the Commissioner of Indian Affairs advised the Bureau's Area Directors that the Little Shell did not exist as a separate entity. He maintained the Indian Claims Commission did not know what they were doing and that the Court of Claims on appeal had "blindly followed". (App. p.477.) Follow-through in the field at the Area Offices and at the Turtle Mountain Agency was totally consistent with that announced policy. No payments of judgment funds for either claim have ever been made to the Little Shell Band.

The lower Court found that plaintiff's claim based upon the above facts was barred by the doctrine of sovereign immunity. Whether "sovereign immunity" is a defense to an action for an accounting of funds entrusted to an agency of the federal government was one of the threshold issues in Cobell v. Babbitt, 30 F. Supp. 2d 24 (District of Columbia, 1988), affirmed on appeal at 345 U.S. App. D.C. 141, 240 F.3d 1081. Cobell, Id., found no immunity existed because immunity had been waived by the Administrative Procedures Act, 5 U.S.C. Sec.

703. The lower Court here held appellant could not rely upon that Act because the six-year statute of limitations had run.

This action is an equitable action that asks for an accounting of money held in trust by the United States of America. The entrustment took place years ago. Congress appropriated the money to satisfy aboriginal land claims made by the lineal descendants of an historical landowning entity. (App. p.329.)

> "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the Unites States… ." 5 U.S.C. 702.

But these plaintiffs need not rely only upon 5 U.S.C. 702. Where the Federal Government has taken control or accepted monies or properties belonging to an Indian entity, a fiduciary relationship exists with respect to such monies or properties even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. United States v. Mitchell ("Mitchell II"), 463 U.S. 206, 225, 77 L.Ed. 2d 580, 103 S.Ct. 2961 (1983) (quoting Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183, 624 F. 2d 981 (1980).

> "It is fundamental that an action for accounting is an equitable claim and that courts of equity have original jurisdiction to compel an accounting." Klamath and Modoc Tribes v. United States, 174 Ct. Cl. 483, 487 (1966).

Cobell v. Babbitt, 30 F.Supp. 2d 24 (Dist of Col. 1989), aff'd 345 U.S. App. D.C. 141, 240 F.2d 1081, involved responsibilities for trust funds as defined in a 1994 statute relating to management of certain types of Indian Trust Funds. That statute is not applicable here. But it is clear the funds involved here come within the purview of both the case law and the common law related to the federal government's trust and fiduciary responsibilities to Indians.

In United States v. Dann, 470 U.S. 39 (1985), the Court was concerned that an award won by an Indian entity in the Indian Claims Commission was placed in trust with the government but the money never reached the claimants. The aggrieved plaintiffs asserted that their claim had never been resolved and they wanted to relitigate the claim. An appeals Court had agreed. The Supreme Court, however, denied the plaintiffs such right holding that upon deposit of the funds into trust "payment" had been made and the land claim was extinguished.

But the Court went on to say that the final award by the **Indian Claims Commission** had placed a new responsibility upon the government with respect to the Tribe:

> "The Government was at once a judgment debtor, owing $26 million to the Tribe, and a trustee for the Tribe responsible for ensuring that the money was put to productive use and ultimately distributed in a manner consistent with the best interests of the Tribe. In short, the **Indian Claims Commission** ordered the Government *qua* judgment debtor to pay $26 million to the Government *qua* trustee for the Tribe as the beneficiary. Once the money was deposited into the trust account, payment was effected.
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> ...

> "In suggesting that significant obstacles to the distribution of the money remain despite the transfer of the fund into a trust account, the Court of Appeals failed to recognize the legal strictures ensuring that the money will be applied to the benefit of the Tribe. We have, for example, held that the United States, as a fiduciary, is obligated to make the funds productive and is fully accountable if those funds are converted or mismanaged. See, *e. g.*, *United States* v. *Mitchell*, 463 U.S. 206, 226 (1983); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 408-409 (1980); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-116 (1938); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937). (Emphasis added.) United States v. Dann, Id.

In the past 15 years the incompetence and mismanagement of funds that have been entrusted to the Department of Interior and the Bureau of Indian Affairs has been publicly exposed time and again. At the time the Court of Claims judgments were affirmed in this case, Congress had been fully aware of the problem. In 1988 Congress held oversight hearings on Interior's management of Indian funds. These hearings led to a report, MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS MISMANAGEMENT OF INDIAN TRUST FUND, H.R.REP. NO 102-449 (1992). This report harshly criticizes the Interior Department's handling of Indian trust funds. The report found "significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds." In spite of this the Little Shell's money was placed in trust with the B.I.A.

The Little Shell Band waited over 100 years for judicial relief from the taking of their aboriginal lands. They have now waited another 30 years for their

award to be delivered to them. The Executive Branch has failed and refused to honor the rulings of the Judicial Branch.

In the early 1830's the Courts had enjoined the confiscation of Cherokee lands in Georgia. In 1833, in direct defiance of the U.S. Supreme Court, President Andrew Jackson "relocated" over 15,000 Cherokee Indians from their treaty lands in Georgia transporting them to the unsettled, distant and remote territory of Oklahoma. Over 4,000 of those Indians died in transit. (This is often referred to as the "Trail of Tears".) Before ordering the removal, President Jackson is purported to have said, "Justice John Marshall has made his decision. Now let him enforce it."

Today it appears it is still the position of the government that it doesn't matter what the Indian Claims Commission and the Court of Claims held. The B.I.A. has done what it wishes, feeling there is nothing that can be done. The government asserts it is immune from accountability. Contrary to the holding of the Indian Claims Commission and Court of Claims, the Executive Branch of the United States government insists to this day the lineal descendants of the Little Shell Band have no separate rights of their own.

When an agency of the federal government delays performance of its legal obligation, a District Court is justified in fashioning equitable relief to ensure the

vindication of a plaintiff's rights" Cobell v. Gale Norton, 345 U.S. App. D.C. 1, 240 F. 3d 1081.

The lower Court suggests that while this action cannot properly be brought against the United States of America, it might be brought against others. In its Memorandum Opinion the Court said:

> "In the present case the Plaintiff seeks relief other than money damages just as in Babbitt, Id. However, Mr. Delorme has not sued a federal agency or an officer or employee thereof for actions taken in their official capacity. He has only sued the United States and not any agency or official. The actions complained of are those of Congress itself for not naming the Little Shells of North Dakota in the two public laws which funded the judgment of the ICC." (App. p. 86.)

The Little Shell Band's grievance is with the United States of America. They prosecuted their ancestral claim against the United States in Docket 18A and in Docket 221. They won. The award was forwarded to Congress for funding. The money was appropriated in P.L. 92-59 and disbursed. (App. p. 474.) It was entrusted back to an agency of the United States government, the Bureau of Indian Affairs, for investment, safekeeping and eventual distribution. No accounting has ever been made to the Little Shell Band.

The Congress of the United States has reserved unto itself the total right, responsibility and obligation to see to it that rights expropriated from aboriginal peoples are compensated and that the people entitled to receive that compensation actually do so. If the United States places the money in trust with the United States

and the persons to whom it has entrusted the money steal it, lose it, divert it or withhold it, the United States has not discharged its fiduciary obligation of seeing to it that the money is held and disbursed for the benefit of those entitled. It should not be the obligation of the persons who won their claim in Court to chase down and collect trust money that has been misapplied, mismanaged or wrongfully withheld.

Plaintiff brings this action for an accounting because of not knowing whether the funds placed in trust with the B.I.A. are safely held and invested or have been lost, stolen or misapplied. The fiduciary duty owing to plaintiff to safe keep, invest and disburse the money won before the Indian Claims Commission should be no less of a duty than was found to exist when the B.I.A. assumed trustee responsibilities for the income from Indian forest lands discussed in United States v. Mitchell, 463 U.S. 206; 77 L. Ed. 2d 580, 103 S. Ct. 2961 (1983) where the Court said:

> "Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942). This principle has long dominated the Government's dealings with Indians. *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Minnesota* v. *United States*, 305 U.S. 382, 386 (1939); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *United States* v. *Candelaria*, 271 U.S. 432, 442 (1926); *McKay* v. *Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 396 (1902); *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v.

Georgia, 5 Pet. 1, 17 (1831).

> Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. See Restatement (Second) of Trusts §§ 205-212 (1959); G. Bogert, Law of Trusts and Trustees § 862 (2d ed. 1965); 3 A. Scott, Law of Trusts § 205 (3d ed. 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust. 1
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> n31 See, *e. g.*, *Seminole Nation* v. *United States*, 316 U.S. 286, 295-300 (1942); *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935); *Moose* v. *United States*, 674 F.2d 1277, 1281 (CA9 1982); *Whiskers* v. *United States*, 600 F.2d 1332, 1335 (CA10 1979), cert. denied, 444 U.S. 1078 (1980); *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 152-156, 550 F.2d 639, 652-654 (1977); *Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 345, 512 F.2d 1390, 1392 (1975); *Mason* v. *United States*, 198 Ct. Cl. 599, 613-616, 461 F.2d 1364, 1372-1373 (1972), rev'd on other grounds, 412 U.S. 391 (1973); *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 507, 364 F.2d 320, 322 (1966); *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 490-491 (1966); *Menominee Tribe* v. *United States*, 102 Ct. Cl. 555, 562, 59 F.Supp. 137, 140 (1945); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 18-20 (1944); *Smith* v. *United States*, 515 F.Supp. 56, 60 (ND Cal. 1978); *Manchester Band of Pomo Indians, Inc*. v. *United States*, 363 F.Supp. 1238, 1243-1248 (ND Cal. 1973).

Once a plaintiff has shown that the government has breached an obligation, the scope of a district court's equitable powers to remedy the wrong is broad. Breadth and flexibility are inherent in equitable remedies. Swann v. Charlotte-Mecklenburg Bd of Educ., 402 U.S. 1, 15, 28 L.Ed. 554, 91 S.Ct. 1267 (1971)

The lower Court also held sovereign immunity applies because the waiver provided by the Administrative Procedures Act is time barred. The claims asserted here are for an accounting of funds entrusted to an agency of the United States government. Funds so entrusted are subject to an ongoing fiduciary duty requiring they be accounted for, kept safe, invested and eventually distributed in accordance with the Court of Claims mandates. United States v. Mitchell, 463 U.S. 206, 77 L.Ed.2d 580, 103 S.Ct. 2961 (1983). The Trust created to hold these funds has continuing and ongoing fiduciary responsibility. There is never a trigger date upon which a Statute of Limitations is tolled. There is no logical argument that after some number of years the Trust dissolves and the funds belong to the B.I.A.

After deciding to dismiss the case, the lower Court went on to address the issue of "standing". The Court said "standing" is not the basis of its decision but plaintiff feels the issue must be dealt with none-the-less because it appears to be a challenge to plaintiff's right to present the issues being presented. The Court comments that other than the assertions of Ronald Delorme, the hereditary Chief of the Little Shell, there is nothing in the record to demonstrate that Chief Delorme represents the Little Shell. The Court asserts it is questionable at best whether Chief Delorme has standing to act on behalf of the Little Shell Band.

The record contains a lengthy affidavit of Chief Delorme that clearly establishes his standing to bring this lawsuit. (App. p. 293-303.) The record does

not contain anything other than unsupported assertions to refute that sworn statement. A Rule 12 motion is treated essentially as a Motion for Summary Judgment. In such instance the Court should accept as true the unchallenged sworn assertions of plaintiff when the defendant has offered nothing to refute them. If upon remand there is an accounting ordered and funds are placed under the supervision of the Court, there will be adequate place and time to sort out the issue of who is an eligible Little Shell and who is not.

The lineal descendants of the historical, landowning entity that won an award in the Courts are entitled to have a share of that award distributed to its members. The B.I.A. has held and distributed the lawsuit judgment funds as though the Little Shell do not exist.

Unilateral actions of the Executive Branch cannot eliminate Indian rights. Turtle Mountain Band of Chippewa Indians, et. al. v. United States, 203 Ct. Cl. 426. The Little Shell Band has never been given any right of participation in the lawsuit award it succeeded in winning after years of litigation. They have been given no voice in the construction of the rolls that designate who is eligible to share in the award. They have been given no voice in the procedures involved in the distribution of funds even thought the Court of Claims noted expressly it was important each Band be allowed to prescribe its own membership requirements.

(App. p. 369-370.) They have received no distribution of funds they won as lineal descendants of the historical landowning entity.

Membership in the Little Shell Band is not synonymous with being a "Non-member Pembina Chippewa Descendant". Chief Little Shell did not require that members of his Band be Pembina or Chippewa. In like manner not all persons who are "Non-member Pembina Chippewa Descendants" are lineal descendants of Chief Little Shell's Band.

The re-defining of who should be included as a recipient of the Court of Claims award has caused an inclusion of those who did not win the award and an exclusion of those who did. In addition, the exclusion of the Little Shell from the process allowed an unmonitored enrollment campaign to take place that dramatically increased the number of enrolled members of the Turtle Mountain Band immediately following the Court of Claims award. This action substantially diluted the value of a distribution mandated by Congress to be "per capita". Aside from maximizing the combined total amount of award that would be received by that reservation's enrolled members, there were other reasons for the enrollment campaign. The governing body of the Turtle Mountain Band was given the right to retain 20% of all its enrolled members' share of the award for administrative, economic development and other social purposes. (App. p. 377.)

To add insult to injury, distribution of the share that had been identified as belonging to the "Non-member Pembina Chippewa Descendants" was made the responsibility of the Turtle Mountain Band. This included assembling of the roll of names of the "Non-member Pembina Chippewa Descendants" who would be eligible to share. Thus the unsuccessful efforts made in Court to preclude the Little Shell Band from participation in the award were effectively achieved by administrative fiat.

The United States wears two hats in this process. It is first a debtor and secondly a trustee. The United States courts resolved the debtor issue with awards affirmed by the Court of Claims. But the United States hasn't followed with its trustee responsibilities to see to it that the judgment funds were ever actually delivered to the benefit of the Little Shell Band.

In the First Cause of Action, appellant asked the United States to account for funds that were supposed to be paid pursuant to the Treaty of 1863. Those funds quantified a land claim and were awarded by the Indian Claims Commission in 1 Indian Claims Commission 575.

In the Second Cause of Action (App. p.4-14.) appellant asked the government to account for funds owing to the Little Shell Band for lands taken without just compensation. Those funds quantified the land claim and were awarded by the Indian Claims Commission in 1972.

In the Third Cause of Action the Little Shell Band asked that if the statutes and regulations allowed for exclusion of the Little Shell Band from participation, those Statutes and regulations should be declared unconstitutional. To hold that the statutes could ignore the Court judgments would violate Constitutional principals related to the separation of powers.

The government moved to dismiss the Complaint. (App. p. 16-54.) Plaintiff filed a return (App. p. 55-56.) with supporting affidavit of Chief Ronald Delorme (App. p. 292-303). The government responded (App. p.57-58). Plaintiff responded thereto (App. p. 59-81). The lower Court dismissed the Complaint and denied plaintiff the right to go forward on any of the causes of action citing the following:

1. The United States has not waived its sovereign immunity as to any of the claims.
2. The claims are barred by a six-year statute of limitations.
3. Plaintiff failed to establish "standing" to assert the claims. (App. p. 82-88.)

None of the bases for dismissal cited by the lower Court should withstand analysis.

As far back as the 1700's the Little Shell Band inhabited the woodland areas west of the Great Lakes in what is now Michigan, Wisconsin, Minnesota and the Dakotas.

A series of treaties and Congressional enactments declared it to be the general policy of the United States that only Congress had the power to negotiate

treaties whereby Indians, with their consent, could be divested of their aboriginal rights. Section 12 of the Indian Trade and Intercourse Act of June 30, 1834, 4 Stat. 729 (codified in 25 U.S.C. 177) proclaimed this policy as follows:

> "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution… ." 25 U.S.C. 177

The funding legislation for the Little Shell's award in the courts can be interpreted to say it was the intent of Congress to exclude the Little Shell Band from the award even though the Little Shell had won their separate claim in Docket No. 221. If so interpreted the legislation violates the separation of powers established by the United States Constitution. The plenary power of the United States over Indians has never been extended by the courts to allow the United States to appropriate the aboriginal rights of an Indian Band so that it could give those rights to another. Lone Wolf v. Hitchcock, 187 U.S. 553, 561 (1903). No right that has been conferred upon Indians can be arbitrarily abrogated by statute. Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912).

The United States cannot appropriate tribal lands and give them to another without rendering just compensation. Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113, (1919).

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), expressly lays to rest any idea that issues of Indian rights are solely reserved for the Congress and that the Courts have no jurisdiction to entertain them. That case holds expressly the federal power over Indian affairs is rooted in the Constitution. The idea that Congress has exclusive plenary power over such rights no longer exists and no longer bars Courts from reaching the merits where constitutional claims are raised by an Indian tribe.

The issue in this case need not rise to Constitutional dimensions. Cobell v. Babbitt, 30 F. Supp. 2d 24 (Dist. of Col 1989), aff'd 345 U.S. App. D.C. 141, 249 F.2d 1081, finds jurisdiction of the Courts in the trust relationship that exists between the government and Indian tribes. This concept is grounded in the law of trusts, not in the Constitution, and is now a source of enforceable rights that has become a major weapon in the arsenal of Indian litigation. See Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians,* 27 Stan L. Rev. 1213 (1975), a 1982 Handbook, supra note 3, at 220-21.

Weeks v. United States, 404 F. Supp. 1325 (W.D. Okla. 1975) and Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), relied upon by the government are long and complex cases and require careful analysis if the true holding is to be identified. The facts of these cases are vastly different but do recite important principles of law that are supportive of appellant's position here.

Delaware Tribal Business Committee, Id., makes it clear the power of Congress over Indian affairs may be plenary in nature but it is not absolute. See, i.e., United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1951). The case notes that Congress has plenary power over matters related to Indian affairs but that does not mean that all federal legislation concerning Indians is immune from judicial scrutiny. The case notes the fact Congress has plenary powers "has not deterred the Courts in this day from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment.", citing Morton v Mancari, 417 U.S. 535 (1974).

The Delaware case says the appropriate standard of judicial review is that the legislative judgment should not be disturbed as long as the special treatment that appears to have been given can be rationally tied to the fulfillment of some unique obligation Congress has toward Indians. Morton, Id.

In Delaware, there was an explicit finding that the omission of the Kansas Delaware from a distribution of an Indian Claims Commission award was "rationally tied" to the fulfillment of a "unique obligation" of the Congress toward the Indians. In the present case there is no rational basis from which it can be argued that an exclusion of the Little Shell Band from the proceeds of their own judgment somehow is tied to some unique obligation of Congress toward Indians.

The analysis of the majority in the Delaware case was as follows:

1. In the Delaware case, only one tribal entity prosecuted a claim before the Indian Claims Commission. That entity was "The Delaware Nation". The Court found that entity had represented all of the Delaware. The Court found the Indian Court of Claims could only adjudicate claims held by an "Indian tribe, band, or other identifiable group". In the present, case none of the other plaintiffs represented the interests of the Little Shell Band. Indeed, one of those co-plaintiffs did everything it could to defeat the Little Shell claim. The Court found the Turtle Mountain Band did not represent the interests of all lineal descendants of the Little Shell Band. Consequently the Delaware case has no factual identity to the present as the Little Shell Band was expressly found to be a separate identifiable ancestral group with its own separate right to participate in the litigation.

2. In the Delaware Nation case the Act authorizing distribution specifically provided that payment would be made to the Delaware tribe of Indians residing in the Cherokee Nation "as said tribe shall in council direct." The Court said the language of the Act emphasized the clear intention of Congress that the money awarded was for the Delaware tribe as distinguished from being an award to individual Delaware Indians who had severed their relations with that tribe. Such is clearly not analogous to the present case. Here the Act expressly created a

"Non-Member Pembina Descendant's" entity. This is an entity separate and distinct from the other plaintiffs who were federally recognized Chippewa tribes.

3. In the Delaware case, the Court said it believed Congress deliberately limited the distribution plan because of substantial problems it perceived would attend if a scheme of wider distribution were devised. This is also clearly not the case here. Indeed, if the Act is read to include more persons than the lineal descendants of the Little Shell Band who prosecuted the claim distribution, problems are enhanced by the fact that the number of persons entitled to share is greatly expanded to include anyone who might establish that he or she is a Pembina descendant regardless of whether his or her ancestors were ever associated with the Little Shell Band.

In Delaware, the Court said:

> "Congress chose to limit distribution of the award to the Cherokee and the Absentee Delaware's' *in whose names the Delaware's' claim had been prosecuted before the Indian Claims Commission, and whom the Commission had found to represent the interests of all the Delaware's".* (Emphasis added) Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

Here the opposite circumstance is true. The Turtle Mountain Band did not prosecute the Little Shell claims. The Turtle Mountain Band and its lawyers became the Little Shell Band's adversary during this litigation. The Little Shell Band's claims were not based upon the same historical facts as the claims of the Turtle Mountain Band. Their claims were not coincidental with all "Non-Member

Pembina Chippewa". The Turtle Mountain Band went to Court claiming its ancestors sold out too cheaply. The Little Shell Band went to Court claiming its ancestors had never sold out at all.

The legal authority relied upon by the trial court actually supports the appellant's position in this case but we also wish to note the blistering dissent of Justice Stevens in Delaware Tribal Business Commission v. Weeks, supra. Justice Stevens examines each of the reasons the majority gave for its decision and proceeds to demonstrate the fallacy inherent in each reason.

He first points out that the exclusion of the Kansas Delaware from the distribution plan was a consequence of a malfunction of the legislative process, not a deliberate choice of Congress. The same conceivably might be said here. In support of this he noted that nothing in the legislative history indicated that Congress was ever made aware that the language of its Act would exclude persons who were in fact lineal descendants of the aboriginal landowning entity.

Next he noted the majority found it significant that the Kansas Delaware who were complaining they had been excluded from participation had terminated their membership in the tribe. But in response to this reasoning, Justice Stevens pointed out that the Cherokees, one of the entities that were being allowed to share, had also terminated their membership, so how could that be a basis of any majority ruling?

Next he noted the majority found it significant the Kansas Delaware had not participated in a previous award and the majority somehow felt this was evidence of a trend and they should not be allowed to participate now. But Justice Stevens pointed out again the hypocrisy of that since a group known as the Absentee Delaware were being allowed to share even though they, too, had also been excluded from that same previous award. Here there is a similar hypocrisy. The Little Shell of Montana have been allowed to participate as a Band in the award.

In this case the statute need not be read to exclude the Little Shell. When dealing with Indians, Congressional enactments are to be liberally construed in favor of the Indians. Doubtful expressions, instead of being resolved in favor of the United States, are to be resolved against it. Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed 941 (1912). The funding legislation here listed four separate entities that would share the award. These were The Turtle Mountain Band of Chippewa Indians, The Chippewa Cree Tribe of Rocky Boy's Reservation, The Minnesota Chippewa Tribe (White Earth Reservation) and the nonmember Pembina Chippewa descendants.

If the party designated as the "Nonmember Pembina Chippewa Descendants" is read to be synonymous with Little Shell Band, the legislation might be considered as constitutional. But such a reading would have required that the Little Shell Band be allowed to participate in determining the eligibility roll, be

entitled to challenge the dilution of the per share award by a large, last minute enrollment at Turtle Mountain, and be entitled to be involved in the timing, process and procedure by which the award would be distributed.

As a result of the language used by Congress to designate the claimants entitled to share, however, the Department of Interior saw an opportunity to accomplish administratively what it had been unable to accomplish in courts. The end result has been that the Little Shell Band as a separate, identifiable, historical "entity" was never given due process or a voice in the identification of its own lineal descendants eligible to share in the award. Neither have they been given any opportunity to challenge the substantial increase in "enrolled members" of Turtle Mountain tribe after the Indian Claims Commission had made the award. The statutes, the CFR's, administrative decisions and the actual processing of the claim have all been interpreted at all levels of the Executive Branch to exclude the Little Shell from all participation.

Unlike the other plaintiffs in the lawsuits with whom the Little Shell were joined for trial, the Little Shell cause of action included the fact their lands had been taken without any treaty with the United States. The Little Shell had the strongest claim of all. Theirs was not just a claim they had been underpaid. They had been paid nothing at all.

The Commissioner of Indian Affairs, William E. Hallett, jumped at the language of the Congressional funding as a justification to exclude the Little Shell as a separate ancestral entity. In a letter to the Aberdeen Area Office of the B.I.A. on August 19, 1980 (App. p. 475-491) designed to instruct the Area Directors on who should share, he wrote:

> "Blindly following the Indian Claims Commission, the Court of Claims in its decision in the subject claims case of January 23, 1974, refers to the Little Shell Band as plaintiffs in Docket Nos. 191 and 221 and in a footnote describes the entity as being also known as the Chippewa Cree Tribe."
>
> ….
>
> "We find, as also demonstrated below, unacceptable the implication, at least, that Chippewa Cree tribal members are not Pembina or are less Pembina than the individuals forming the "Little Shell Band". Letter from Charles E. Hallett to Area Directors, August 19, 1980. Id.

The historical record is clear that when the BIA and the Turtle Mountain Band of Chippewa were unable to convince the Courts that the Little Shell Band was not a distinct ancestral group entitled to its own separate participation, the Commissioner of Indian Affairs administratively interpreted and enforced the rights of the parties in exactly the manner the government and the Turtle Mountain Band had argued in Court and lost.

The tone of the Commissioner's 13-page letter to the Area Director makes it clear the Area Director is expected to ignore the "unacceptable" decision of the

Court of Claims because it had blindly followed the erroneous decision of the Indian Claims Commission.

With such instructions from the top it is little wonder that when Ronald Delorme, present Chief of the Little Shell Band, inquired as to the status of the Little Shell award he was told only this:

> "The award in dockets numbered 113, 191, 211, and 246 was made for the 1905 value of Pembina lands west of the Red River area ceded to the United States by agreement approved by Congress on April 21, 1904, and by the Pembina on February 15, 1905." (App. p. 492.) Letter of April 6, 1987, Deputy to the Assistant Secretary of Indian Affairs.)

The Assistant Secretary's above references to Docket numbers ***totally excludes Docket # 221***, the Little Shell claim. But the judgment money entrusted to the B.I.A. included that which was awarded in Docket 221. The Bureau continued to act as though the Little Shell claim does not exist. The reference to an agreement by which "Pembina" had ceded lands west of the Red River could not have been a reference to the Little Shell as they had not ceded anything. In that same letter the Assistant Secretary expressly rejects the findings made by the Indian Claims Commission and by the Court of Claims. The Deputy to the Assistant Secretary for Indian Affairs (Tribal Services) wrote:

> *"The Bureau's opinion is that the Turtle Mountain Band of Chippewa Indians is a tribal successor to the Pembina Band of the period 1892-1905 and earlier. There is no evidence that the present members of the Turtle Mountain Band do not derive from ancestors who themselves derive from the*

Red River-Turtle Mountain homeland and the Plains Ojibwa societies associated with that area." (App. p. 492.)

This was exactly the same argument unsuccessfully made before the Indian Claims Commission and the Court of Claims.

After Congress funded the award, the money was deposited in a B.I.A. Trust Account to await distribution. Rolls of eligible recipients were constructed. A plan for distribution was created. Neither the Chief of The Little Shell nor his Grand Council were ever afforded any input into the construction of the rolls, the application date requirements, the eligibility requirements, the supporting documentation that would be required, or any other aspect of the plan that was adopted and carried out.

The B.I.A.'s Superintendent of the Turtle Mountain Agency called for applications by "Non-member Pembina Chippewa Descendants". Some Little Shell lineal descendants applied. Some did not. Eventually, on January 21, 1994, the Agency Superintendent certified a roll of persons who had applied by a deadline date the Agency had adopted. (App. p. 501**.)**

Those found to meet certain blood quantum requirements and to have submitted satisfactory genealogy Pembina-Chippewa documentation were declared eligible to share in the award. "Enrolled members" of the Turtle Mountain tribe did not need to submit anything. They were deemed eligible by reason of being "enrolled members" without regard to who they were or where they came from.

The government alleged that Ronald Delorme, the current Chief, himself applied and participated in a distribution. The lower Court accepted that assertion and questioned whether because of it he now had no "standing" to complain. Whether he did or did not is irrelevant to the prosecution of these claims. As hereditary Chief, Ronald Delorme represents the ancestral entity that prevailed in Court. The descendants of that ancestral entity now own the claim. That entity has never received the compensation awarded to it. As for the claim that Delorme participated in a distribution, even if true, does not preclude him nor any of other current member of the Little Shell Band from participating in a distribution to the Little Shell Band as long as they are no longer members of the Turtle Mountain Band. (App. p. 499.)

The lineal descendants of the Little Shell Band do not know today what happened to the award they won. There is evidence the B.I.A. retains it in whole or in part. Chief Delorme has obtained copies of spreadsheets that purport to show an initial deposit of $47,352,407.66 from the Treasury of The United States into a B.I.A. trust account. (App. p. 474.) With interest or investments this amount appears to have grown initially to $105,055,350.84 (App. p. 494). By the time distributions began to be made in 1988 there may have been as much as $130,920,786.50 held in trust. (App. p. 495).

On the Spread Sheet for January 12, 1994 (App. p. 495), there is an entry reciting $17,858, 352.10 under a column entitled “Non Member Pembina Lineal Descendants”. In this lawsuit plaintiff seeks an accounting that would show what disposition, if any, has been made of these funds, what amounts remain, what investments have been made, what disbursements have been made from these funds, when and to whom the disbursements have been made.

If there is an accounting, the lower court should be able to enter an appropriate order taking custody of the funds that belong to the Little Shell Band and establish a structure for future safekeeping and distribution of the award to those who are eligible.

CONCLUSION

The lower Court erred when it dismissed the Little Shell Band's claims in response to a Rule 12 F.R.Cv.P. Motion to Dismiss based upon defenses of Sovereign Immunity, Statute of Limitation and Standing. None of those defenses are applicable in an action for an accounting of funds over which the United States has assumed a role as fiduciary and trustee. The United States's fiduciary duty to account and to safe keep, invest and distribute those funds pursuant to a judgment of the Indian Court of Claims is continuing, ongoing, and current. The lower Court's challenge to "standing" is vague, equivocal, and admittedly not a basis of its decision. Plaintiff presented the basis of his right of representation of the Little Shell Band's interest by affidavit and nothing was submitted by the government to refute the evidence submitted in that regard.

The case should be remanded with instructions that an accounting by the United States should be ordered and for such other actions as may be necessary to enforce the Little Shell Band's rights to participate in the awards it won before the Indian Claims Commission.

Dated this _____ day of January 2003.

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the type-volume limitations or Rule 32(a)(7), F.R.App.P. The brief contains _____ words, exclusive of the contents allowed by the rules.

This brief was prepared in Microsoft Word.

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Dated this 3rd day of January 2003.

_____
IRVIN B. NODLAND

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Ronald Delorme as Hereditary Chief of the Little Shell Band of Indians and its Grand Council,	)	
Plaintiff,	)	
vs.	)	Case No. 02-3460
United States of America,	)	
Defendant.	)	

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF BURLEIGH)

I, Bonnie J. Sanders, being first duly sworn, depose and state that on the 3rd day of January 2003 I served Brief of Appellant and Appendix of Appellant upon the following person(s) by sending the original to the 8th Circuit Court of Appeals and by placing a copy of same in the United States mails at Bismarck, ND, with sufficient postage affixed thereto, in an envelope(s) addressed as follows:

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_____

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Subscribed and sworn to before me this 3rd day of January 2003.

_____

IRVIN B. NODLAND
Notary Public
Burleigh County, ND
My Commission Expires 6/28/06

ADDENDUM